

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DEC 21 2001

MICHAEL N. MILBY, CLERK OF COURT

MARK NEWBY, and All Others	)	C.A. No. H-01-3624
Similarly Situated,	)	And Consolidated Actions:
	)	
Plaintiff,	)	01cv3789, 01cv3630, 01cv3670,
	)	01cv3838, 01cv3647, 01cv3652,
v.	)	01cv3889, 01cv3660, 01cv3717,
	)	01cv3734, 01cv3735, 01cv3681,
ENRON CORP., et al,	)	01cv3671, 01cv3682, 01cv3733,
	)	01cv3647, 01cv3686, 01cv3914,
Defendants.	)	01cv4071, 01cv3737, 01cv3736,
	)	01cv4189, 01cv3839, 01cv3993
	)	
AND CONSOLIDATED ACTIONS	)	JUDGE LEE H. ROSENTHAL

MEMORANDUM OF LAW IN SUPPORT OF  
MOTION OF LOCAL 710 PENSION FUND  
FOR APPOINTMENT OF LEAD PLAINTIFF AND COUNSEL

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## I. INTRODUCTION

Enron Corporation investor Local 710 Pension Fund moves this Court for its appointment as Lead Plaintiff of a proposed class of persons or entities who purchased securities of Enron Corporation ("Enron" or the "Company") during the period October 19, 1998 through November 7, 2001 (the "Class Period"), and approval of its choice of counsel.

Local 710 Pension Fund, an institutional investor, with losses of over \$2.5 million from its Class Period purchases of Enron securities, is believed to have the largest financial interest in the relief sought by this action among class members filing motions for appointment as lead plaintiff and is, therefore, presumptively the most adequate lead plaintiff on behalf of the class pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").<sup>1</sup>

The above-captioned action was filed on October 22, 2001. Since that time, dozens of putative class actions were commenced in this District on behalf of an identical or largely-overlapping putative class and based upon the same underlying facts (the "Actions"). Each of the Actions charges Enron, certain officers and directors, and its auditors with violations of sections 10(b) and 20(a) of the Securities Exchange Act of

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<sup>1</sup> See charts annexed to Ex. C to Declaration of Earnest Wotring in Support of Motion For Appointment As Lead Plaintiffs And For Approval of Lead Plaintiff's Choice of Counsel (the "Wotring Declaration"), setting forth the movant's class period transactions and losses.



1934 and Rule 10b-5 promulgated thereunder.<sup>2</sup> The suits allege that during the class period, defendants made false and misleading statements about Enron's business and issued favorable, but materially false, financial statements that were distorted through complex, massive off-balance-sheet financial accounting. As a result of these false statements, the complaints allege, Enron's stock was artificially inflated during the Class Period. Enron's officers and directors took advantage of this artificial inflation, selling more than 7 million shares of their Enron stock for proceeds of more than \$434 million.

Enron is an Oregon corporation with its principal place of business in Houston, Texas. Enron is engaged in electricity, natural gas and communications businesses. The company produces electricity and natural gas, develops, constructs and operates energy facilities worldwide and delivers both physical commodities and financial risk management services to customers.

In October of 2001, Enron disclosed that it would suffer substantial losses, and a reduction in shareholders' equity of over *\$1 billion*, as a result of complex financial transactions with two partnerships established by Enron's then chief financial officer. Enron's shares lost 50% of their value in one week, falling from \$33.84 per share on October 16, 2001 to close at \$16.40 per share on October 24, 2001.

On November 8, 2001, Enron announced it was restating

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<sup>2</sup> Many of the related actions asserted claims against Enron, however, on December 2, 2001, Enron filed for bankruptcy, thereby staying all claims against it.

its results for 1997, 1998, 1999 and 2000, and the first two quarters of 2001 to correct for errors which had inflated Enron's net income by \$591 million in those years. In addition, Enron admitted that audit reports for those years should not be relied upon. The impact of the restatement was enormous. Upon these disclosures, Enron's stock dropped to as low as \$0.26 per share by November 30, 2001, a mere fraction of the Class Period high of \$90.75.

Procedurally, Movant's claims are typical of the Class, and the Movant will fairly and adequately represent the claims of the class. As such, pursuant to the PSLRA, this Court should appoint the Movant as Lead Plaintiff and approve its choice of counsel.

## **II. PROCEDURAL HISTORY**

The above-captioned Action was commenced on October 22, 2001. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), plaintiff's counsel duly published the required early notice to Class members on October 22, 2001 on PRNewswire, advising the public of the pendency of the class action. See Wotring Declaration, Ex. A.

Dozens of additional class actions were subsequently filed against Enron and are pending in this District. All of the Actions arise from Enron's Class Period misrepresentations and omissions that give rise to the first-filed Newby Action. They name many of the same defendants and are asserted on behalf of largely overlapping investor classes. By order dated December 12, 2001, the Court consolidated more than two dozen actions



under the above caption.<sup>3</sup>

The PSLRA requires early notice to advise Class members of their right to move this Court to be appointed Lead Plaintiff within 60 days of publication. 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Movant has filed this motion prior to the expiration of the 60-day period from the publication of the notice. Further, 15 U.S.C. § 78u-4(a)(3)(B) requires the Court to decide this motion (a) within 90 days from the date of early notice publication or (b) as soon as practicable after deciding any pending motion to consolidate, whichever is later.

### III. ARGUMENT

#### A. The Court Should Appoint Movant to Serve as Lead Plaintiff

Movant moves herein for entry of an Order providing for (i) the appointment of Local 710 Pension Fund as Lead Plaintiff for the proposed class; and (ii) the Court's approval of the lead plaintiff's selection of counsel for the class.

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<sup>3</sup> The consolidated actions are: Christianson v. Enron Corp., et al, 01cv3671; Odam, et al v. Enron, et al, 01cv3914; John P. McCarthy Mone v. Enron Corp. et al, 01cv3686; Casey, et al v. Enron Corp, et al, 01cv3647; Mashayekh v. Enron Corp, et al, 01cv3737; Archdiocese of Milwa v. Enron Corp, et al, 01cv4071; Pinchuck v. Enron Corp, et al, 01cv3736; Daly v. Enron Corp, et al, 01cv4189; Kaufman v. Enron Corp, et al, 01cv3682; Koroluk v. Enron Corp, et al, 01cv3733; Brill v. Enron Corp, et al, 01cv3734; Busch v. Enron Corp, et al, 01cv3735; Gottdiener v. Enron Corp, et al, 01cv3681; Fragione v. Enron Corp, et al, 01:3889; Gottesman v. Enron Corp, et al, 01cv3660; Steiner v. Enron Corp, et al, 01cv3717; Casey, et al v. Enron Corp, et al, 01cv3647; Greenberg v. Enron Corp, et al, 01cv3670; Wilson v. Enron Corporation, et al, 01cv3652; Camarata v. Enron Corp, et al, 01cv3993; Raphael v. Enron Corp, et al, 01cv3839; Karcich, et al v. Enron Corp, et al, 01cv3838; Lee v. Enron Corp, et al, 01cv3789; Abrams, et al v. Enron Corp, et al, 01cv3630.



Movant meets the criteria under 15 U.S.C. § 78u-4 (a) (3) (B) (iii) (I) as noted below, and respectfully urges the Court to grant its motion.

**1. Local 710 Pension Fund Has Timely Filed A Motion To Serve As Lead Plaintiff**

The PSLRA requires that one seeking to be a lead plaintiff must have filed a complaint or made a timely motion to serve as lead plaintiff. 15 U.S.C. § 78u-4(a) (3) (B) (iii) (I) (aa). Movant is filing this motion in a timely fashion. Moreover, Movant has signed a certification expressing a willingness to serve as a representative party on behalf of the Class. See Wotring Decl. Ex. B.

**2. Movant Has The Largest Financial Interest In The Relief Sought By The Class**

The PSLRA provides that the most adequate plaintiff is presumed to be the person or group of persons that, among other things, "has the largest financial interest in the relief sought by the class." See 15 U.S.C. § 78u-4 (a) (3) (B) (iii) (I) (bb). Movant is an institutional investor that acquired millions of dollars worth of Enron securities during the Class Period. Calculating its loss in accordance with 15 U.S.C. § 78u-4 (e) (1) or (e) (2) indicates aggregate loss for the Movant in excess of \$2.5 million. See Wotring Decl. Ex. C (setting forth Movant's losses and explaining the method of calculation used).<sup>4</sup>

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<sup>4</sup> Local 710 Pension Fund reserves the right to revise its damage calculation at the appropriate stage of the litigation and/or after the parties retain damage experts.

Furthermore, the PSLRA expresses a clear preference for appointment of institutional investors to serve as lead plaintiffs. See, e.g., In re Baan Co., 186 F.R.D. 214, 221 (D.D.C. 1999); In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 412 (D.N.J. 1998); In re Olsten Corp. Sec. Litig., 181 F.R.D. 218, 221 (E.D.N.Y. 1998). The Local 710 Pension Fund is precisely the type of institutional investor that the PSLRA favors.

**3. The Proposed Lead Plaintiff Satisfies The Requirements Of Rule 23 Of The Federal Rules Of Civil Procedure**

The PSLRA provides that, in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff or plaintiffs must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). F.R.C.P. 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Of the four prerequisites for class certification, only two -- typicality and adequacy -- directly address the personal characteristics of the proposed class representative. Consequently, in deciding a motion for appointment of Lead



Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification.<sup>5</sup> In re Reliance Accept. Group, Inc. Sec. Litig., 1998 WL 388260, at \*4 (W.D. Tex. June 29, 1998); In re Milestone Scientific, 183 F.R.D. at 414; Fischler v. Amsouth Bancorp., 1997 WL 118429, at \*2 (M.D. Fla. Feb. 6, 1997); In re Oxford Health Plans Sec. Litig., 182 F.R.D. 42, 49 (S.D.N.Y. 1998). As set forth below, movant satisfies the typicality and adequacy requirements of Rule 23(a), and, therefore, should be appointed as Lead Plaintiff.

**a. Movant's Claims Are Typical Of The Claims Of The Class**

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). Thus, the typicality requirement is satisfied when the named plaintiff's claims "stem from the same event, practice or course of conduct that forms the basis of the class claims and [are] based on the same remedial theory." Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D. 70, 73 (S.D. Tex. 1990) (citing 7A, Wright, Miller & Kane, Federal

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<sup>5</sup> This interpretation is supported by 15 U.S.C. § 78u-4 (a) (3) (B) (iii) (II), which provides that the presumption in favor of the most adequate plaintiff may be rebutted only upon proof that this individual or group "(aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class."



Practice and Procedure, § 1764, at 228 (1986)); see also Kalodner v. Michaels Stores, Inc., 172 F.R.D. 200, 204 (N.D. Tex. 1997).

As stated in Weinberger v. Jackson, 102 F.R.D. 839 (N.D. Cal. 1984):

Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. Accordingly, differences in the amount of damage, the size or manner of [stock] purchase, the nature of the purchaser, and even the specific document influencing the purchase will not render a claim atypical in most securities cases.

102 F.R.D. at 844 (citing 5 Herbert B. Newberg, Newberg on Class Actions §8816, at 850 (1977)). Thus, the typicality requirement does not require identical claims.

Movant's claims are typical of, if not identical to, the other class members' claims. The Actions consolidated under the above caption all allege that defendants violated the federal securities laws through public misrepresentations and omissions concerning Enron's business, accounting and financial statements, which caused Enron's securities to trade at artificially inflated prices throughout the Class Period. Movant, like all class members, suffered injury when they acquired Enron securities during the Class Period at those artificially inflated prices. Movant's claims therefore arise from the same events or course of conduct that gives rise to claims of other class members, and are based on the same legal theories.

**b.    The Proposed Lead Plaintiff Will Fairly and Adequately Represent the Interests of the Class**



Prior to the enactment of the PSLRA, courts evaluated two factors in assessing the adequacy of proposed class representatives: (1) whether the class representatives appear capable of prosecuting the action through competent counsel; and (2) whether there existed antagonism or disabling conflict between the interests of the class representatives and the interests of the members of the class. See, e.g., In re Corrugated Container AntiTrust Litig., 643 F.2d 195, 208 (5th Cir. 1981); Longden v. Sunderman, 123 F.R.D. 547, 558 (N.D. Tex. 1988). The PSLRA apparently modifies this analysis somewhat, however, by directing the Court's inquiry to the existence of any conflicts between the interests of the proposed representatives and the members of the class, and allowing the lead plaintiffs to retain counsel to represent the class, "subject to the approval of the court." See 15 U.S.C. § 78u-4(a)(3)(B)(v).

Here, the interests of Local 710 Pension Fund are clearly aligned with the those of the class, and there is no evidence of any antagonism between the interests of this institution and the class. As detailed above, movant shares numerous common questions of law and fact with the class, and its claims are typical of the claims of other members of the class. Further, movant already has demonstrated its interest in pursuing this action on behalf of the class by signing a certification attesting to that Movant's willingness to assume the responsibilities of a lead plaintiff. See Wotring Decl. Ex. B. Thus, the close alignment of interests between movant and all

other class members, combined with the strong desire of this institution to prosecute these actions on behalf of the class, militates in favor of granting this motion.

**B. The Court Should Approve The Proposed Lead Plaintiff's Choice Of Counsel**

The PSLRA vests authority in the lead plaintiff or plaintiffs to select and retain counsel, subject only to the approval of the Court. See 15 U.S.C. § 78u-4 (a)(3)(B)(v). Thus, the Court should not disturb the lead plaintiff's choice of counsel unless "necessary to protect the interest of the plaintiff class." See Statement of Managers -- The "Private Securities Litigation Reform Act of 1995," 141 Cong. Rec. H13691-08, at H13700 (daily ed. Nov. 28, 1995). Here, movant has retained the law firms of Futterman & Howard, Chtd and Kirby McInerney & Squire LLP to pursue the claims on behalf of the proposed class, and will retain that firm as the plaintiff's lead counsel in the event that it is appointed lead plaintiff, with the law firm of Connelly Baker Wotring & Jackson LLP to serve as liaison counsel for the proposed class. The Futterman and Kirby law firms possess extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors, as reflected by the firm résumés annexed to the Wotring Declaration as Exs. D and E. Thus, the Court may be assured that, in the event the motion is granted, the members of the class will receive the highest quality of legal representation available.



V. CONCLUSION

For all the foregoing reasons, the movant respectfully requests that the Court: (i) appoint Local 710 Pension Fund as Lead Plaintiff for the proposed class; (ii) approve of the movant's selection of lead counsel; and (iii) grant such other and further relief as the Court may deem just and proper.

Dated: December 21, 2001

Respectfully submitted,

CONNELLY BAKER WOTRING & JACKSON L.L.P.

By: 

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**Certificate of Conference**

Counsel for Movant states that he was unable to consult with the other parties regarding the relief requested in this motion. Given the upcoming deadline for filing the motion and the fact that the parties who might have an interest in this motion have yet to be identified, the Movant will not be able to attempt to consult with the interested parties until after the deadline for filing this motion. Specifically, the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u-4) requires that motions for appointment of lead plaintiff be filed within 60 days of published notice of a securities fraud class action. In this action, that deadline expires on December 21, 2001. That Act also provides that such motions may be filed by individuals and institutions that are not parties to the action. It is, therefore, impossible to identify (and to confer with) all potential movants. In fact, the undersigned represents a movant that is not currently a party to the action. The act only allows other potential plaintiffs (not defendants) to oppose motions for appointment of lead plaintiffs. Thus, there is no need to confer with defendants' counsel. Furthermore, as the statute requires the filing of these motions, the filing of this motion could not be obviated through conference. Movant will supplement its certificate of conference as soon as it is reasonably possible to do so.

  
\_\_\_\_\_  
Earnest W. Wotring



**CERTIFICATE OF SERVICE**

I, EARNEST WOTRING, an attorney duly admitted to practice before this Court, hereby certify that on the 21 day of December, 2001, I caused a true and correct copy of the MEMORANDUM OF LAW IN SUPPORT OF MOTION OF LOCAL 710 PENSION FUND FOR APPOINTMENT OF LEAD PLAINTIFF AND COUNSEL, PROPOSED ORDER APPOINTING LEAD PLAINTIFF AND APPROVING LEAD PLAINTIFF'S CHOICE OF LEAD COUNSEL AND LIAISON COUNSEL, MOTION OF LOCAL 710 PENSION FUND FOR APPOINTMENT OF LEAD PLAINTIFF AND COUNSEL and DECLARATION OF EARNEST WOTRING IN SUPPORT OF LOCAL 710 PENSION FUND'S MOTION FOR APPOINTMENT OF LEAD PLAINTIFF AND FOR APPROVAL OF LEAD PLAINTIFF'S CHOICE OF COUNSEL AND LIAISON COUNSEL to be served upon the attached service list via First Class Mail.

Dated: Houston, Texas  
December 21, 2001



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UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MARK NEWBY, and All Others	)	C.A. No. H-01-3624
Similarly Situated,	)	And Consolidated Actions:
	)	
Plaintiff,	)	01cv3789, 01cv3630, 01cv3670,
	)	01cv3838, 01cv3647, 01cv3652,
v.	)	01cv3889, 01cv3660, 01cv3717,
	)	01cv3734, 01cv3735, 01cv3681,
ENRON CORP., et al,	)	01cv3671, 01cv3682, 01cv3733,
	)	01cv3647, 01cv3686, 01cv3914,
Defendants.	)	01cv4071, 01cv3737, 01cv3736,
	)	01cv4189, 01cv3839, 01cv3993
<hr/>		
AND CONSOLIDATED ACTIONS	)	JUDGE LEE H. ROSENTHAL
	)	

DECLARATION OF EARNEST WOTRING IN SUPPORT OF  
LOCAL 710 PENSION FUND'S MOTION FOR APPOINTMENT OF  
LEAD PLAINTIFF AND FOR APPROVAL OF LEAD PLAINTIFF'S  
CHOICE OF COUNSEL AND LIAISON COUNSEL

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Counsel for Local 710 Pension Fund



EARNEST WOTRING, declares as follows:

1. I am a member of the law firm of Connelly Baker Wotring & Jackson LLP, co-counsel for Enron Corporation investor Local 710 Pension Fund. I make this declaration in support of Local 710 Pension Fund's motion for appointment of lead plaintiff and approval of its choice of lead counsel.

2. Attached hereto as Exhibit A is a true and correct copy of the notice to class members concerning the first-filed of the above-captioned actions that was published on October 22, 2001, advising the public of the pendency of a class action against Enron Corporation.

3. Annexed as Exhibit B is a true and correct copy of the sworn certification signed by Local 710 Pension Fund pursuant to the requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). See 15 U.S.C. § 78u-4(a)(2).

4. Attached hereto as Exhibit C is a chart setting forth Local 710 Pension Fund's Class Period transactions in Enron securities and calculating its damages therefrom.

5. Attached hereto as Exhibits D and E are true and correct copies of the résumés of Futterman & Howard Chtd. and Kirby McInerney & Squire LLP, who seek appointment as plaintiff's lead counsel.

I declare under penalty of perjury that the foregoing  
is true and correct.

Dated: December 21, 2001

A handwritten signature in cursive script, appearing to read "Ernest Wotring", written over a horizontal line.

Ernest Wotring



The Exhibit(s) May  
Be Viewed in the  
Office of the Clerk